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Supreme Court of the United States

JAMES OBERGEFELL, ET AL., PETITIONERS,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR FOREIGN AND COMPARATIVE LAW EXPERTS HAROLD HONGJU KOH, THOMAS BUERGENTHAL, SARAH H. CLEVELAND, LAURENCE R. HELFER, RYAN GOODMAN, AND SUJIT CHOUDHRY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.

GREGORY BOURKE, ET AL., PETITIONERS,

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BRIEF FOR FOREIGN AND COMPARATIVE LAW EXPERTS HAROLD HONGJU KOH, THOMAS BUERGENTHAL, SARAH H. CLEVELAND, LAURENCE R. HELFER, RYAN GOODMAN, AND SUJIT CHOUDHRY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are among the country's leading experts in foreign and comparative constitutional law and human rights. Each has published and lectured widely in the field. Each has extensive knowledge of global judicial and legislative developments regarding the rights of gay men and lesbians, including the significant and ongoing steps toward recognizing same-sex equality in marriage.[2]

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[1] Letters from petitioners consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). Letters from respondents granting blanket consent to the filing of amicus curiae briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court is not the first to consider whether a state may single out and penalize one class of people—same-sex couples—by excluding them from an essential social and civil institution—marriage. Many constitutional democracies with which we share common values have concluded that the exclusion of marriage rights for same-sex couples violates their constitutional principles. Whether by judicial decisions or legislation, these states have embraced marriage rights for same-sex couples based on constitutional principles common to the rights protected under the Fourteenth Amendment, including individual liberty, dignity, and equality.

Liberal democracies like ours have made steady and undeniable progress toward full marriage equality. Beginning in the 1980s and 1990s, when a number of European countries created registered partnerships, constitutional democracies have given same-sex couples some of the same rights afforded to married opposite-sex couples. Since 2001, twenty countries have embraced equal marriage throughout their jurisdictions for reasons that have persuasive force before this Court.

The reasoning of these states' courts and legislatures provides a useful perspective that this Court should consider. As this Court recognized in *Lawrence*, fundamental principles such as "liberty," "dignity," and "equality" are not solely American, but

rather universal, concepts whose interpretation by other leading constitutional courts can inform this Court's understanding of issues. *See Lawrence v. Texas*, 539 U.S. 558, 572-573, 576-577 (2003). As Justice Breyer has noted, "the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances," *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting), may "cast an empirical light on the consequences of different solutions to a common legal problem," *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

Significantly, foreign states that permit marriage for same-sex couples have successfully balanced the rights of religious institutions with the rights of couples to take part in civil marriage. Whatever countervailing "compelling governmental interest" or parade of horribles opponents of equal marriage may have imagined simply have not materialized.

This Court should also recognize the influence its decision may have on the rest of the world. "When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the

State of Washington, or Springfield, Illinois."[3] Accordingly, foreign courts considering human-rights issues have often looked to this Court's decisions. For example, *Lawrence* has been invoked to strike down foreign laws that impinge upon the intimate relations between gay and lesbian couples. This Court's decision here will certainly influence the decisions of other liberal democracies that are debating how and when to recognize equal rights for same-sex couples.

Finally, a ruling that States may single out and deny same-sex couples the same marriage rights extended to opposite-sex couples would diminish U.S. leadership in the field of personal freedom and human rights. The United States has long cherished a deep and abiding reputation as "the world's foremost protector of liberties." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285 (1990) (Brennan, J., dissenting). The Court's ruling in this case will affect whether the United States continues to be seen as a global leader in the robust defense of personal autonomy and human dignity.

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[3] Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988).

ARGUMENT

DEVELOPMENTS IN OTHER LIBERAL DEMOCRACIES CONFIRM THAT LEGAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION PRINCIPLES REQUIRE FULL MARRIAGE EQUALITY

This Court does not stand alone in the world. It is only one of many high courts in a constitutional democracy to consider whether same-sex couples have an equal right to enter into the legal institution of marriage. Numerous courts from countries that share common legal values with the United States have concluded as a matter of constitutional law that same-sex couples must be afforded full marriage rights. Those decisions rest upon principles common to our own understanding of the rights protected under the Fourteenth Amendment, including the liberty to make fundamental choices for one's own life free from government intervention, the dignity and worth of all persons, and equality under the law. Due process and equal protection are not exclusively American property; they are legal concepts that we share with these other nations. Accordingly, the decisions from other nations that have wrestled with the same question provide valuable insight into the individual liberty and equality issues at stake in these cases.

A. Decisions From Courts Of Other Constitutional Democracies Provide This Court With A Useful Comparative Perspective

Just as this Court's decisions have influenced the jurisprudence of other nations, this Court has long benefitted from understanding how foreign nations that share many of our legal attributes, traditions, and history have confronted similar questions.[4] While of course not binding on this Court, "the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances" may offer concrete solutions when those issues arise here. *Knight*, 528 U.S. at 997 (Breyer, J., dissenting).

As Chief Justice Rehnquist observed more than two decades ago:

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to the decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so

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[4] *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); Vicki C. Jackson, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

> many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.

William Rehnquist, *Constitutional Courts—Comparative Remarks*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchof & Donald P. Kommers eds., 1993); *see also United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) ("These countries are our 'constitutional offspring' and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.").

This Court has considered foreign and international law to illuminate, in particular, the rights guaranteed by "due process of law" and "equal protection of the laws." U.S. CONST. amend. XIV, § 1. Constitutional terms like "liberty" and "equality" are universal. As Justice Frankfurter explained in considering whether a forced confession was constitutional in *Malinski v. New York*, "[t]he safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples." 324 U.S. 401, 413-414 (1945) (Frankfurter, J., concurring); *see also Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 366 (1916) (our Constitution embodies "relatively fundamental rules of right, as generally understood by all English-speaking communities").

In *Lawrence*, this Court consulted comparative and international precedents in overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and holding unconstitutional state laws criminalizing consensual intimacy between persons of the same sex. The *Lawrence* Court explained: "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere." 539 U.S. at 576. The Court observed that the "European Court of Human Rights has followed not *Bowers* but its own decision" and that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct." *Ibid.* As the Court noted, that right "has been accepted as an integral part of human freedom in many other countries." *Id.* at 577. Indeed, the Court in *Lawrence* criticized *Bowers* for making "sweeping references * * * to the history of Western civilization" but "not tak[ing] account of other authorities pointing in an opposite direction." *Id.* at 572-573.

In turn, foreign judiciaries have increasingly relied on *Lawrence* as illustrating fundamental standards of human decency. For example, courts in Hong Kong and Fiji invoked the holding and reasoning of *Lawrence* in striking down anti-sodomy laws. *Leung TC William Roy v. Secretary for Justice*, [2005] 3 H.K.L.R.D. 657 para. 140 (C.F.I.) (H.K.); *McCoskar v. State* [2005] FJHC 500 (Fiji).

The interaction among courts with respect to *Lawrence* was just the beginning of what is now a vibrant, interactive conversation across jurisdictions regarding the rights of same-sex couples to live not just free of discrimination but holding the equal status of marriage.[5]

For example, in *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts cited and relied upon the decision of the Court of Appeal for Ontario to conclude that the common-law meaning of marriage must be refined to include same-sex couples. 798 N.E.2d 941, 969 (Mass. 2003). In turn, the Supreme Court of Appeal of South Africa cited *Goodridge* when holding South Africa's marriage-exclusion laws unconstitutional, as did Brazil's Superior Tribunal de Justiça. *Fourie v. Minister of Home Affairs* ("*Fourie I*") 2005 (3) BCLR 241 (S. Ct. App.) at 253-254 para. 18 (S. Afr.); S.T.J.,

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[5] *See* Kenji Yoshino & Michael Kavey, *Immodest Claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michael Rosenfeld & András Sajó eds., 2012); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 99 (1994) ("Courts are talking to one another all over the world."); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

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Not all legislative and judicial decisions from the world community concerning the recognition of same-sex relationships provide models that this Court should follow. Decisions from nations that do not share our constitutional values for individual liberty, equality, and dignity may still be useful in that they may provide "anti-models," i.e., decisions from which this Court should consciously depart.[7]

For example, in *Roper v. Simmons*, this Court observed that the only seven countries other than the United States to have executed juvenile offenders since 1990 were states that do not share a common constitutional heritage with us: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. 543 U.S. 551, 577 (2005). Eschewing those anti-models, the Court observed that the "United Kingdom's experience bears particular relevance here in light of the historic ties between our countries." *Ibid.*

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[6] *Available at* https://ww2.stj.jus.br/processo/jsp/revista/abreDocumento.jsp?componente=ITA&sequencial=1099021&num_registro=201000366638&data=20120201&formato=PDF.

[7] *See* Sujit Choudhry, *The* Lochner *Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1 (2004); Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism,"* 2000 WIS. L. REV. 597 (2000).

As demonstrated below, reasoned opinions from other liberal, constitutional democracies have concluded that excluding same-sex couples from the fundamental institution of marriage violates core rights of freedom, dignity, and equality. These decisions provide important authority to support the same interpretation of those rights here.

B. Foreign Jurisdictions That Have Recognized Equal Marriage Rights Confirm That Discrimination Against Same-Sex Couples In Marriage Impermissibly Affronts Fundamental Notions Of Liberty, Dignity, And Equality

1. A growing number of liberal democracies have recognized marriage equality

a. As chronicled in the appendix to this brief, many legal systems throughout the world have now fully embraced equal marriage rights for gay and lesbian people. Others have taken significant steps on the road toward marriage equality by requiring that same-sex couples be provided legal recognition and protection. Courts and legislatures that have taken these actions have invoked principles common to our understanding of rights under the Fourteenth Amendment: among them the individual liberty to marry the person of one's choice, equality under the law, and the unacceptability of denying access to essential institutions based on the gender of a person's chosen life partner. These decisions offer strong support for this Court to hold that States must both license marriages between individuals of the same

sex and recognize marriages between two people of the same sex who were lawfully married in another State.

The progression toward marriage equality began in the 1980s, when a number of European democracies began offering limited legal rights for same-sex couples. App., *infra*, 1a. Then in the 1990s, many of these countries formally recognized same-sex couples through registered domestic partnerships or civil unions. *Id.* at 1a-2a. In 2001, the Netherlands—which previously had authorized registered partnerships for same-sex couples—became the first country to recognize full marriage equality. *Id.* at 2a-3a.

Since then, nineteen other countries, many of which had previously granted domestic partnerships or civil unions to same-sex couples, have adopted full marriage equality: Argentina, Belgium, Brazil, Canada, Denmark, England, Finland, France, Iceland, Luxembourg, New Zealand, Norway, Portugal, Scotland, South Africa, Spain, Sweden, Uruguay, and Wales. *Id.* at 3a-12a.

In addition, Israel recognizes same-sex couples' marriages performed in other countries, several Mexican states solemnize same-sex marriages, and Vietnam has decriminalized same-sex weddings. *Id.* at 10a. In May 2015, Ireland will vote on a government-proposed Marriage Equality referendum to amend the constitution to permit same-sex couples to marry. *Id.* at 12a. And the assembly of the Shibuya

Ward in Tokyo recently announced plans to vote on providing legal rights to same-sex couples. *Ibid.*[8]

b. In some of these countries, courts ruled that the lack of full marriage privileges for same-sex couples violated fundamental constitutional rights. When the legislatures in these countries ultimately implemented those high-court decisions, the legal framework that emerged was enacted as a direct result of judicial decisions.

For example, between 2002 and 2004, courts in nine of Canada's provinces and territories, including Ontario, British Columbia, and Quebec, uniformly held that the exclusion of same-sex couples from the institution of civil marriage violated the Canadian Charter of Rights and Freedoms. *See Halpern v. Canada* (2003), 65 O.R. 3d 161 (Can. Ont. C.A.); *EGALE Canada, Inc. v. Canada* (2003), 225 D.L.R. 4th 472 (Can. B.C. C.A.); *Hendricks v. Québec*, [2002] R.J.Q. 2506 (Can. Que. C.S.), *appeal dismissed*,

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[8] To be sure, not every foreign state that has addressed these questions has ruled for marriage equality. Italy's highest appellate court, the Supreme Court of Cassation, recently ruled that same-sex couples were not entitled to full marriage rights under the country's constitution, while at the same time recognizing their right to legal protections for their relationships. Cass., sez. un., Feb. 9, 2015, n. 2400, 14 (It.), *available at* http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/2400_02_15.pdf. Yet as the history of other countries shows, such a decision requiring interim protections often later results in full marriage equality through court decision or legislation.

Hendricks v. Canada (2004), 238 D.L.R. 4th 577 (Can. Que. C.A.); App., *infra*, 3a-4a. Following that guidance, the Canadian Parliament proposed a bill defining marriage as the lawful union of two people. In 2004, the Supreme Court of Canada ruled that this bill was constitutional, holding that "[t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another." *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 719 para. 46 (Can.). Canada's Civil Marriage Act became law on July 20, 2005. Civil Marriage Act, S.C. 2005, c. 33 (Can.).

In December 2005, the Constitutional Court of South Africa joined Canada in holding unconstitutional the exclusion of same-sex couples from the institution of civil marriage. *Minister of Home Affairs v. Fourie* ("*Fourie II*") 2006 (3) BCLR 355 (CC) (S. Afr.), *aff'g Fourie I*, 2005 (3) BCLR 241. In both *Fourie* decisions, the courts held that excluding same-sex couples from marriage violates constitutional rights to equality and human dignity. The South African Parliament implemented the Constitutional Court's ruling through legislation. Civil Union Act 17 of 2006 (S. Afr.).

c. Recent court decisions also are paving the way for marriage equality in Colombia and Mexico.

In Colombia, the Constitutional Court held in 2011 that the constitution precludes the legislature from formally recognizing only opposite-sex couples, and it gave the legislature two years to implement a

solution that results in the issuance of marriage licenses to same-sex couples. *See* Corte Constitucional [C.C.] [Constitutional Court], July 26, 2011, Sentencia C-577/11 (Colom.).[9] That deadline passed without action by the legislature, leading to the solemnization of some marriages of same-sex couples and to further litigation pending in the Constitutional Court.

After Mexico City amended its marriage laws to include same-sex couples, Mexico's Supreme Court of Justice ruled in 2010 that those marriages must be recognized throughout Mexico. App., *infra*, 7a. In December 2012, the same court ruled unanimously that Oaxaca's ban on marriage by same-sex couples was unconstitutional. Amparo en Revisión 581/2012, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], Dec. 5, 2012 (Mex.). That decision was based on a February 2012 decision of the Inter-American Court of Human Rights, which held that signatories to the Inter-American Convention on Human Rights could not discriminate on the basis of sexual orientation. *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012). In 2014, the State of Coahuila became the first state in

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[9] *Available at* http://www.corteconstitucional.gov.co/comunicados/No.%2030%20comunicado%2026%20de%20julio%20de%202011.php.

Mexico to adopt marriage equality through legislation. App., *infra*, 8a.[10]

2. *Foreign jurisdictions have grounded same-sex marriage rights in part on the principle that liberty may not be denied without due process of law*

This Court has long recognized that state laws may violate the Due Process Clause of the Fourteenth Amendment if they unduly restrict rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 324-325 (1937). "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence*, 539 U.S. at 562. The heart of liberty "is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

If liberty means anything, it must necessarily include the freedom to marry the person of one's choosing. *See Loving v. Virginia*, 388 U.S. 1, 12

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[10] In addition, in some cities and states in Mexico, courts have ordered civil registrars to allow particular same-sex couples to marry despite the absence of a state-wide ruling granting marriage rights to all same-sex couples. *E.g.*, *Lawyer: Mexican City Allows Same-Sex Wedding After Long Fight*, N.Y. TIMES (Jan. 17, 2015), http://www.nytimes.com/aponline/2015/01/17/world/americas/ap-lt-mexico-gay-marriage.html; *Yucatan Court Orders Recognition of Gay Marriage*, MEX. GULF REP. (Apr. 30, 2013), http://www.mexicogulfreporter.com/2013/04/yucatan-federal-court-orders.html.

(1967). "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Ibid.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). Deciding whom to marry is one of "'the most intimate and personal choices a person may make in a lifetime'" and is "'central to the liberty protected by the Fourteenth Amendment.'" *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). Our Constitution "demands" respect "for the autonomy of the person in making these choices." *Ibid.*

Laws that deny same-sex couples the opportunity to marry and/or to have their lawful marriages recognized deny couples the freedom to define their own relationships by choosing whether and whom to marry. Accordingly, a number of foreign courts have recognized that the fundamental liberty interest to choose whom one will marry must include the right to marry a person of the same sex.

For example, the Court of Appeal for Ontario explained that the "common law requirement that persons who marry be of the opposite sex" violates core principles of liberty because it "denies persons in same-sex relationships a fundamental choice—whether or not to marry their partner." *Halpern*, 65 O.R. at 185 para. 87. The court held that one of the "essential values" in the Canadian Charter of Rights and Freedoms "is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life." *Ibid.* (internal quotation marks omitted). "Limitations * * * that

serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty." *Ibid.* (internal quotation marks omitted).

Similarly, the Constitutional Court of South Africa reasoned that the freedom to marry is an essential component of the liberty rights of gay men and lesbians:

> The capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations. It offers a social and legal shrine for love and for commitment and for a future shared with another human being to the exclusion of all others.
>
> The current common-law definition of marriage deprives committed same-sex couples of this choice. In this our common law denies gays and lesbians who wish to solemnise their union a host of benefits, protections and duties. * * *
>
> The vivid message of the decisions of the last ten years is that this exclusion cannot accord with the meaning of the Constitution, and that it undermines the values which underlie an open and democratic society based on freedom and equality.

Fourie I, (3) BCLR at 252-253 paras. 14-16 (footnotes and internal quotation marks omitted).

Likewise, the Superior Tribunal de Justiça of Brazil ruled that a same-sex couple could convert their civil union into marriage based, in part, on the freedom to define one's family differently. The court reasoned that "planning of the family is present as soon as there is a decision by two people to unite, with a view to constituting a family, and from that moment the Constitution guarantees to them full liberty of choice about the way in which this union will take place." S.T.J., Rec. Esp. No. 1.183.378-RS (2010/0036663-8) (Braz.).

3. *Foreign jurisdictions have grounded their decisions in human dignity, which this Court has held is protected by the Constitution*

In *Lawrence*, this Court acknowledged that "'the most intimate and personal choices a person may make in a lifetime'"—which are "'central to personal dignity and autonomy'"—are "'protected by the Fourteenth Amendment.'" 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). For that reason, *Lawrence* struck down the Texas statute banning sexual intimacy between same-sex persons in part because the

"stigma th[e] criminal statute imposes" degrades "the dignity of the persons charged." *Id.* at 575.[11]

This Court's decision in *United States v. Windsor* also relied heavily on the effect of the Defense of Marriage Act ("DOMA") on the dignity of same-sex couples and their children. 133 S. Ct. 2675, 2692-2696 (2013). The Court recognized that marriage "[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person," and therefore the State's "decision to give [same-sex couples] the right to marry conferred upon them a dignity and status of immense import." *Id.* at 2692, 2694. The Court declared Section 3 of DOMA unconstitutional in part because the "essence" of DOMA was to "interfere[] with the equal dignity of same-sex marriages," by "divest[ing] married same-sex couples of the duties and responsibilities that are an essential part of married life." *Id.* at 2693, 2695. The Court recognized that DOMA "place[d] same-sex couples in an unstable position of being in a second-tier marriage." *Id.* at 2694. DOMA also "[told married same-sex] couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition." *Ibid.*

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[11] "[T]he Supreme Court has, since World War II and the Universal Declaration of Human Rights, embedded the term dignity into the U.S. Constitution" as "an example of how U.S. law is influenced by the norms of other nations, by transnational experiences, and by international legal documents." Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1926 (2003).

This "differentiation demeans the couple," and it likewise "humiliates tens of thousands of children now being raised by same-sex couples." *Ibid.* The Court explained that DOMA "ma[de] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Ibid.*

Like *Lawrence* and *Windsor*, much of the foreign jurisprudence on the rights of same-sex couples draws on judicial understandings of the dignity and worth of individual persons.[12] In *Halpern*, the Court of Appeal for Ontario concluded that excluding same-sex couples from the "fundamental societal institution [of] marriage" discriminated against gay men and lesbians in a manner that offended human dignity:

> The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex

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[12] *See* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008); Christopher Tollefsen, *The Dignity of Marriage*, *in* UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2013).

> relationships. In doing so, it offends the dignity of persons in same-sex relationships [and is therefore discriminatory].

Halpern, 65 O.R. 3d at 189-190 para. 107.

As *Halpern* found, "this case is ultimately about the recognition and protection of human dignity." *Id.* at 167 para. 2. In so finding, the court applied the Canadian Supreme Court's decision in *Law*, which had defined human dignity as meaning "that an individual or group feels self-respect and self-worth," and had held that "[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits." *Id.* at 167 para. 3 (quoting *Law v. Canada*, [1999] 1 S.C.R. 497, 530 para. 53 (Can.)).[13] *Halpern* also relied on the Ontario Human Rights Code, which provides:

> "[I]t is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a

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[13] In *Law*, the Supreme Court of Canada explained that the purpose of the equal protection provision of the Canadian Charter of Rights and Freedoms is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration." 1 S.C.R. at 529 para. 51.

> climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province[.]"

Halpern, 65 O.R. 3d at 167 para. 4 (alterations in original) (quoting R.S.O. 1990, ch. H. 19, pmbl. (Can. Ont.)).

In the same vein, in *EGALE*, the British Columbia Court of Appeal (the highest court in British Columbia) stated that "[t]he evidence supports a conclusion that 'marriage' represents society's highest acceptance of the self-worth and the wholeness of a couple's relationship, and, thus, touches their sense of human dignity at its core." *EGALE*, 225 D.L.R. 4th at 501 para. 90. The very act of public, civil marriage affirms the couple's relationship and the life they intend to join together. Denying one group the freedom to take that step relegates them to a "separate but equal" status, affronts their dignity, and discriminates against them.

The South African marriage cases are also rooted in the same conception of human dignity and personal autonomy. In *Fourie II*, the Constitutional Court examined the intangible harms to human dignity from being denied both equal access to marriage and the right to choose to marry:

> It reinforces the wounding notion that they are to be treated as biological oddities, as

> failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

Fourie II, (3) BCLR at 383 para. 71. Similarly, in *Fourie I*, the Supreme Court of Appeal stated:

> More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all.

Fourie I, (3) BCLR at 253 para. 15.

Like its Canadian counterpart, the South African Constitutional Court relied on a prior opinion concerning the importance of human dignity, *National Coalition for Gay & Lesbian Equality v. Minister of Home Affairs* ("*National Coalition*") 2000 (1) BCLR 39 (CC) at 63 para. 42 (S. Afr.). *Fourie II*, (3) BCLR at 374-375 para. 50. In *National Coalition*, the Constitutional Court held that the partners of married different-sex couples cannot be given preferential immigration status over same-sex couples. *National Coalition*, (1) BCLR at 82-83 para. 97. Again, the reasoning of the Constitutional Court was unequivocal—human dignity, privacy, and equality demand

that same-sex couples' relationships be afforded the same legal status as those of opposite-sex couples:

> Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.

Id. at 64 para. 42.

4. Foreign jurisdictions have recognized that excluding same-sex couples from marriage violates equal protection under the law

In *Romer v. Evans*, this Court struck down a Colorado constitutional amendment forbidding legal protection of sexual conduct between same-sex partners, in part, because the law "impos[ed] a broad and undifferentiated disability on a single named group." 517 U.S. 620, 632 (1996). In so holding, *Romer* recognized an obvious truth: that unfounded and targeted prejudice against a particular group can never be a legitimate government interest. Yet as numerous foreign decisions recognize, marriage-exclusion laws are motivated by precisely the same illegitimate

interest that *Romer* disavowed: "a bare * * * desire to harm a politically unpopular group [which] cannot constitute a *legitimate* governmental interest." *Id.* at 634 (omission and emphasis in original) (internal quotation marks omitted).

In accord with our Nation's equal-protection jurisprudence, several foreign decisions have concluded that laws excluding same-sex couples from the rights and responsibilities of marriage impermissibly offend core values of equality. In *Fourie I*, the South African Court of Appeal held that the exclusion of same-sex couples from an institution of such fundamental social significance as marriage "undermines the values which underlie an open and democratic society based on freedom and equality." *Fourie I*, (3) BCLR at 253 para. 16 (citation and internal quotation marks omitted). On appeal, the Constitutional Court concurred, holding that the exclusion of same-sex couples from civil marriage "represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples." *Fourie II*, (3) BCLR at 383 para. 71.

In Colombia, the Constitutional Court held that the Colombian Constitution recognizes and protects the nation's cultural diversity and that therefore an imposition of a single type of heterosexual family would be contrary to the Constitution. *See* Corte Constitucional [C.C.] [Constitutional Court], July 26, 2011, Sentencia C-577/11 (Colom.) (summarizing the

decision as providing the government with a two year period before it must begin issuing same-sex marriage licenses).

Brazil's Superior Tribunal de Justiça declared: "Equality, and equal treatment, presuppose the right to be different, the right to self-affirmation, and to a life-project that is independent of traditions and orthodoxies. In a word: the right to equality is only realized in full if the right to difference is guaranteed." S.T.J., Rec. Esp. No. 1.183.378-RS (2010/0036663-8) (Braz.) (emphasis omitted).

Prior to passage of Canada's 2005 Civil Marriage Act, multiple Canadian courts ruled against the marriage exclusion that existed there, relying on precedents prohibiting discrimination based on sexual orientation. *See Egan v. Canada*, [1995] 2 S.C.R. 513, 528-529 para. 5, 536 para. 22 (Can.) (recognizing that sexual orientation is "analogous to the enumerated grounds" listed in Section 15 of the Canadian Charter, and that it therefore falls under that Section's equal-protection guarantee).

Mexico's Supreme Court of Justice's decision relies on the impermissibility of discriminating based on sexual orientation. Amparo en Revisión 581/2012. The court held that the Oaxacan state marriage law's reference to a man and a woman constituted sexual-orientation discrimination. The court held section 143 of the Civil Code of Oaxaca unconstitutional because it infringed on the principles of equality and freedom from discrimination enshrined in articles 1

and 4 of the Constitution. *Ibid.* The Court added that marriage is not static and that the institution must be adapted to changing realities in order to avoid discrimination. *Ibid.*[14]

Global legislative activity respecting equal marriage has been similarly animated by these principles of ensuring equality and avoiding discrimination based on sexual orientation. With the passage of equal-marriage legislation in Argentina in 2010, Senator Luis Juez announced that allowing same-sex couples to marry was a matter of legal equality, separate from other considerations.[15] In introducing Mexico City's 2009 legislation, assemblyman David

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[14] Even in *Schalk and Kopf v. Austria*, App. No. 30141/04 para. 105 (Eur. Ct. H.R. 2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605, which held that Austria was not compelled to elevate a couple's domestic partnership to the status of marriage where Austrian law had not previously bestowed that status, the European Court of Human Rights expressly disavowed discrimination on the basis of sexual orientation. The court highlighted the "emerging European consensus towards legal recognition of same-sex couples," and made clear that equal marriage was fully consistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms and that same-sex couples enjoy a *family life* that is protected by the Convention. *See* Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014).

[15] Soledad Gallego-Díaz, *Argentina, primer país de Latinoamérica en aprobar el matrimonio gay*, EL PAIS (July 15, 2010), http://internacional.elpais.com/internacional/2010/07/15/actualidad/1279144804_850215.html.

Razu stated: "We only want everyone treated equally under the law, there is no intention to violate anyone's rights, this simply acknowledges the rights of one social sector with no detriment to another."[16] In 2008, Norwegian Family Issues Minister Anniken Huitfeldt declared that the country's "new marriage law is a step forward along the lines of voting rights for all and equality laws."[17] This theme was repeated in a speech to the New Zealand Parliament by Louisa Wall, who sponsored that country's marriage-equality bill: "The purpose and intent of this bill is very clear. It means that the law and the social and civil institutions that that law governs apply equally to everyone."[18]

Conservative British cabinet member Maria Miller, who introduced the marriage-equality bill for England and Wales in the House of Commons, declared: "Marriage is not static; it has evolved and parliament has chosen to act over the centuries to make it fairer and more equal. We now face another

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[16] *Mexico City Lawmakers to Consider Gay Marriage*, LATIN AM. HERALD TRIB. (Nov. 25, 2009), http://www.laht.com/article.asp?ArticleId=348002&CategoryId=14091.

[17] Christy M. Glass et al., *Toward a "European Model" of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?*, 29 BERKELEY J. INT'L L. 132, 160 (2011).

[18] Louisa Wall, Member of Parliament, Speech to New Zealand Parliament: Marriage (Definition of Marriage) Amendment Bill—First Reading (Aug. 29, 2012), http://www.parliament.nz/en-nz/pb/debates/debates/speeches/50HansS_20120829_00001399/wall-louisa-marriage-definition-of-marriage-amendment.

such moment—another such chance in this new century."[19] And as Lord Lester stated when the bill was introduced into the House of Lords:

> The Bill removes * * * discrimination by securing equality for same-sex couples according to the newer view of consent-based marriage * * * . The attempt to define same-sex marriage differently from opposite-sex marriage while claiming that they are somehow equal would inevitably be seen by ordinary men and women in the street * * * as attempting to give the traditional view of marriage a superior status. It is essential to be sure that the marriage of same-sex couples is not regarded as less worthy than the marriage of opposite-sex couples.[20]

When that law took effect in 2014, Prime Minister David Cameron celebrated the "important moment for our country," explaining that the law "says we are a country that will continue to honour its proud traditions of respect, tolerance and equal worth."[21]

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[19] Patrick Wintour, *Gay Marriage Plans Offer "Quadruple Lock" for Opposed Religious Groups*, GUARDIAN (Dec. 11, 2012), http://www.guardian.co.uk/society/2012/dec/11/gay-marriage-quadruple-lock-religious-groups.

[20] 747 PARL. DEB., H.L. (2013) 15-16 (U.K.) (debate on Marriage (Same Sex Couples) Bill), *available at* http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/130708-0001.htm#13070811000878).

[21] David Cameron, *When People's Love Is Divided by Law, It Is the Law that Needs to Change*, PINK NEWS (Mar. 28, 2014), http://www.pinknews.co.uk/2014/03/28/david-cameron/.

Similarly, when Scotland legalized marriage for same-sex couples, Alex Neil, the Cabinet Secretary for Health and Wellbeing, described the new law as an "important signal that our nation is absolutely committed to the same rights for all our citizens."[22]

Like many U.S. states, a number of foreign jurisdictions initially adopted separate civil union or domestic partnership regimes for same-sex couples but subsequently acknowledged those regimes as discriminatory and abandoned them in favor of full marriage. Denmark, the first country to grant some legal protections to same-sex couples through its Registered Partnership Act, replaced the registered-partnership regime with full marriage equality.[23] The same was true in Sweden, Iceland, and Norway, all of which eliminated systems of registered partnerships for same-sex couples, recognizing that such a regime

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[22] Gov't of Scotland, Press Release, *Set the Date for First Same Sex Marriages* (Oct. 13, 2014), http://news.scotland.gov.uk/News/Set-the-date-for-first-Same-Sex-Marriages-1149.aspx.

[23] Peter Stanners, *Gay Marriage Legalised*, COPENHAGEN POST (June 7, 2012), http://cphpost.dk/news/gay-marriage-legalised.1843.html.

is inadequate.[24] When Coahuila became the first Mexican State to enact legislation authorizing same-sex marriage, congressman Samuel Acevedo explained that the existing law allowing civil unions "infringed on the rights of homosexual people and now they will get their rights."[25]

5. *In contrast, many jurisdictions that do not respect individual freedom, dignity, and equality deny basic civil rights to gay men and lesbians*

Despite the increased recognition of equal marriage rights in liberal democracies across the world, several nations continue to deny gay men and lesbians virtually all fundamental freedoms, including the right to marry a person of one's choice. These "anti-models" stand in stark contrast to the increasing

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[24] Michael Bogdan, *Private International Law Aspects of the Introduction of Same-Sex Marriages in Sweden*, 78 NORDIC J. INT'L L. 253, 253-254 (2009); Ministry of Justice, Gov't Offices of Swed., *Gender-Neutral Marriage and Marriage Ceremonies Fact Sheet* 1 (May 2009), http://www.government.se/content/1/c6/12/55/84/ff702a1a.pdf; Birna Bjornsdottir & Nicholas Vinocur, *Iceland Passes Gay Marriage Law in Unanimous Vote*, REUTERS (June 11, 2010), http://www.reuters.com/article/2010/06/11/us-iceland-gaymarriage-idUSTRE65A3V020100611; Marriage Act, 4 July 1991 No. 47 § 1 (Nor.), *available at* http://www.regjeringen.no/en/doc/Laws/Acts/the-marriage-act.html?id=448401; Torstein Frantzen, *National Report: Norway*, 19 AM. U. J. GENDER SOC. POL'Y & L. 273, 273-274 (2011).

[25] *Mexican State of Coahuila Approves Same-Sex Marriage*, BBC NEWS (Sept. 2, 2014), http://www.bbc.com/news/world-latin-america-29028305.

recognition of marriage equality in nations that share our constitutional values.

Nigeria, for example, recently enacted the Same Sex Marriage (Prohibition) Act, 2013, which goes far beyond prohibiting same-sex couples from marrying or having their marriages recognized.[26] Whereas bare animus toward a group may render U.S. laws unconstitutional, *see Romer*, 517 U.S. at 632, Nigerian officials have been explicit in their anti-gay animus.[27] The Act subjects anyone who enters into—or even witnesses—a same-sex marriage or civil union to imprisonment.[28] The Act also imposes prison terms on anyone who "participates in" or "supports" socializing among gay individuals or who "makes public show of same sex amorous relationship."[29]

Several other "anti-model" regimes have actively encouraged repression against gay men and lesbians.

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[26] Same Sex Marriage (Prohibition) Act, 2013 (Nigeria), *available at* https://allout-production-site.s3.amazonaws.com/allout-200-Nigeria_Same_Sex_Marriage_Prohibition_Law_2014.pdf.

[27] In Bauchi State in Northern Nigeria, some authorities have used passage of the law as license to increase persecution of gays and lesbians. Chairman Mustapha Baba Ilela of the state Shariah Commission told the Associated Press that police had targeted gay men, tortured them into naming additional people, and "are on the hunt for others." Nate Rawlings, *Anti-Gay Law Takes Effect in Africa's Most Populous Country*, TIME (Jan. 15, 2014), http://world.time.com/2014/01/15/nigeria-anti-gay-law/.

[28] *Id.* § 5(1), (3).

[29] *Id.* § 5(2)-(3).

Uganda has gained international notoriety for its attempts to criminalize same-sex relations. For example, Uganda's 2014 Anti-Homosexuality Act included provisions proscribing consensual same-sex intimate conduct by Ugandans outside the country, and included penalties for individuals, companies, media organizations, or non-governmental organizations that know of gay people or support gay rights.[30] Iran imposes a death sentence for the "passive" male involved in sodomy.[31] The Gambia recently amended its criminal code to impose life sentences for homosexual activity.[32]

Russia too has adopted an anti-gay "propaganda" law that legalizes discrimination against sexual minorities.[33] In December 2014, Human Rights

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[30] The Anti-Homosexuality Act of 2014 (Uganda). In 2014, the Ugandan Supreme Court ruled that the law had been invalidly enacted because the legislature lacked a quorum. *See Oloka Onyago & 9 Ors v. Attorney General, Constitutional Petition No. 08 of 2014* [2014] UGCC (1 Aug. 2014). The law has been reintroduced as The Prohibition of Promotion of Unnatural Sexual Practices Bill of 2014 but has not yet been readopted.

[31] *English Translation of Books I & II of the New Islamic Penal Code*, IRAN HUMAN RIGHTS DOCUMENTATION CENTER, arts. 233-234 (2014), *available at* http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.html#45.

[32] Criminal Code (Amendment) Act No. 11 of 2014, § 4 (Oct. 9, 2014) (Gam.).

[33] Federal Law of June 29, 2013 No. 135-FZ, On Changes to Article 5 of the Federal Law "On Protecting Children from Information Harmful to their Health and Development" (Russ.).

Watch documented the growing number of attacks against gays, lesbians, bisexuals and transgender people in Russia, and the failure of authorities to prevent and prosecute violence in the law's aftermath.[34] Asylum requests from Russians have grown dramatically since the law's enactment.[35]

Characteristically, these overtly homophobic laws are part of a much broader practice of human-rights violations in "anti-model" states.[36] Such laws have drawn harsh criticism from international bodies and U.S. officials. For example, the former U.N. High Commissioner for Human Rights Navi Pillay said of Nigeria's recent law: "Rarely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights. Rights to privacy and non-discrimination, rights to freedom of expression, association and assembly, rights to freedom

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[34] Human Rights Watch, *License to Harm: Violence and Harassment against LGBT People and Activists in Russia* 1-4 (Dec. 2014), *available at* http://www.hrw.org/sites/default/files/reports/russia1214_ForUpload.pdf.

[35] Carl Schreck, *Number of Russian Asylum Seekers to U.S. Spikes in Wake of "Antigay" Law*, RADIO FREE EUR./RADIO LIBERTY (Oct. 15, 2014), http://www.rferl.org/content/russia-asylum-us-gay-law/26639402.html.

[36] *See, e.g.*, U.S. Dep't of State, Bureau of Democracy, Human Rights & Labor, *Country Reports on Human Rights Practices for 2013: Russia* (2013), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dlid=220324#wrapper; Arch Puddington, *Discarding Democracy: A Return to the Iron Fist*, FREEDOM HOUSE (2015), https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf.

from arbitrary arrest and detention: this law undermines all of them."[37]

United States foreign policy calls for these laws to be condemned, not upheld. U.S. Secretary of State John Kerry expressed our Nation's deep concern with Nigeria's Act, stating that it "dangerously restricts freedom of assembly, association, and expression for all Nigerians."[38] The U.S. Department of State also expressed "dismay[ ]" at the Gambia's law and urged the Gambia's Government to "protect the human rights and fundamental freedoms of all its citizens."[39] The State Department recently designated a Special Envoy for the Human Rights of LGBT Persons to "significantly advance efforts underway to move towards a world free from violence and discrimination against LGBT persons."[40] In announcing the

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[37] U.N. Office of High Comm'r for Human Rights, Press Release, *UN Human Rights Chief Denounces New Anti-Homosexuality Law in Nigeria* (Jan. 14, 2014), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=14169.

[38] John Kerry, Sec'y of State, Press Statement, *Deep Concern with Nigeria's Enactment of the Same Sex Marriage Prohibition Act* (Jan. 13, 2014), http://www.state.gov/secretary/remarks/2014/01/219587.htm.

[39] Jeff Rathke, Dir., Office of Press Relations, Press Statement, *State Dept. on Law, Arrests of LGBT Persons in the Gambia* (Nov. 24, 2014), http://iipdigital.usembassy.gov/st/english/texttrans/2014/11/20141124311417.html#axzz3K0EJB2w3.

[40] John Kerry, Sec'y of State, Press Statement, *Special Envoy for the Human Rights of LGBT Persons* (Feb. 23, 2015), http://www.state.gov/secretary/remarks/2015/02/237772.htm.

appointment, Secretary Kerry proclaimed: "Defending and promoting the human rights of LGBT persons is at the core of our commitment to advancing human rights globally—the heart and conscience of our diplomacy."[41]

C. Foreign Jurisdictions Have Successfully Balanced Equal Marriage Rights And Religious Freedom

Equal marriage rights need not intrude upon anyone's religious freedom. Unlike those states in which the persecution of gay men and lesbians has escalated, most liberal democracies are engaged in a rigorous debate concerning the scope and pace of equal rights as applied to lesbian, gay, bisexual, and transgender people. The experience of other constitutional democracies confirms that protecting the rights of same-sex couples to marry need not, and does not, denigrate the rights of others.

As the court in *Halpern* observed, "[a]llowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples." 65 O.R. 3d at 195 para. 137. Similarly, in a speech to Portugal's parliament urging enactment of that country's equal marriage law, Prime Minister José Sócrates explained: "No one should interpret this law as a victory of some over others. This law represents a victory for all, this is always true of all laws about

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[41] *Ibid.*

liberty and humanity."[42] In a similar vein, Prime Minister Jose Luis Rodriguez Zapatero expressed his support for Spain's marriage equality law, noting that the triumph of the same-sex couples who obtained the right to marry "is everyone's triumph. It is also the triumph of those who oppose this law, even though they do not know this yet, because it is the triumph of liberty."[43]

Significantly, foreign jurisdictions that have authorized same-sex marriages have successfully balanced individual rights with community preferences, not by condoning illegal discrimination, but rather by permitting religious institutions and clergy to choose whether to solemnize marriages between same-sex couples. Both the Supreme Court of Canada and South Africa's Constitutional Court ensured that religious officials may continue to enjoy the full exercise of their beliefs by permitting clergy to refuse to solemnize marriages between people of the same sex. *Reference re Same-Sex Marriage*, 3 S.C.R. at 721-723 paras. 55-60; *Fourie II*, (3) BCLR at 392-393 para. 98. Other jurisdictions have followed suit. For example, the laws legalizing same-sex marriage in England, Wales, and Scotland exempt religious organizations from having to perform same-sex

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[42] Diário da Assembleia da República, 1 Série Número. 20 at 8 (Jan. 9, 2010), *available at* http://tinyurl.com/na4s6vg.

[43] Michael Kirby, *Foreword*, *in* CURRENT TRENDS IN REGULATION OF SAME-SEX RELATIONSHIPS x (Paula Gerber & Adiva Sifris eds., 2010).

weddings. Marriage (Same Sex Couples) Act of 2013, Chapter 30, 17 July 2013 (Eng.) (effective March 29, 2014); Marriage and Civil Partnership Act, 12 March 2014 (A.S.P. 5) (Scot.) (effective December 31, 2014). As a result, the many religious organizations that recognize same-sex marriages may—and do—solemnize such marriages while others are free to choose not to.

That predominantly Catholic countries such as Spain, Portugal, Mexico, Argentina, and Brazil now allow same-sex marriages (either throughout the country or in some jurisdictions), vividly illustrates that religious freedom and individual rights can readily co-exist with respect to same-sex marriage. Those jurisdictions made the deliberate choice—whether through legislation or judicial decision—to implement same-sex marriages despite strong opposition from leaders of the Catholic Church. Their choices show an emerging global consensus among liberal democracies that governments best ensure the dignity and autonomy of all people not by stigmatizing some and arbitrarily denying equal access to the legal institution of marriage, but rather by respecting the religious freedom of some groups to grant solemn recognition of the sacrament of marriage in accordance with the particular tenets of their faith.

CONCLUSION

For the foregoing reasons and those stated in petitioners' briefs, States may not exclude same-sex couples from the essential institution of marriage, nor

may they refuse to recognize marriages between persons of the same sex when their marriages were lawfully licensed and performed out of state.

Forty-eight years ago, this Court overturned state law prohibitions on interracial marriage in *Loving v. Virginia*. In the past fourteen years, numerous democratic nations around the world have honored the equal protection legacy of this Court by embracing marriage equality. To preserve U.S. leadership in the field of personal freedom and human rights, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

SUMMARY OF KEY HISTORICAL EVENTS RELATED TO SAME-SEX MARRIAGE

The following summary highlights key developments in the global progression toward marriage equality, focusing on jurisdictions outside the United States.[1]

A. Introduction Of Domestic Partnerships And Civil Unions

The Netherlands (1979). Adopts unregistered cohabitation scheme, giving limited rights to same-sex couples.

Denmark (1986). Recognizes unregistered same-sex relationships.

Sweden (1988), Norway (1989), Belgium (1998). Extend common-law marriage rights to same-sex couples.

Denmark (1989), Norway (1993), Sweden (1994), Iceland (1996), the Netherlands (1997), Belgium (1999), California (1999), France (1999), Germany (2000), Finland (2001). Formally adopt registered partnerships for same-sex couples, granting some but not all of the same rights as marriage.

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[1] The events are listed in chronological order within each section.

Vermont (1999-2000). Supreme Court of Vermont rules that excluding same-sex couples from marriage rights violates Vermont constitution and orders legislature to establish same-sex marriage or equivalent institution. Vermont legislature enacts civil union law.[2]

B. The First Same-Sex Marriage Laws

The Netherlands (2001). Enacts the first same-sex marriage law in 2000. Staatsblad van het Koninkrijk der Nederlanden 2001, nr. 9 (11 January)

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[2] After 2001, numerous other jurisdictions around the world, including in the United States, create registered-partnership regimes or civil unions for same-sex couples (many of which are subsequently replaced by full legal marriage).

Jurisdictions with registered partnerships include Tasmania, Australia (2003); New Jersey (2004); Maine (2004); Luxembourg (2004); the United Kingdom (2004); Switzerland (2005); Slovenia (2005); Czech Republic (2006); Washington (2007); Oregon (2007); Victoria, Australia (2008); Australian Capital Territory, Australia (2008); Maryland (2008); Hungary (2009); Nevada (2009); Wisconsin (2009); Austria (2009); New South Wales, Australia (2010); Ireland (2010); Isle of Man (2011); Liechtenstein (2011); Jersey (2011); Queensland, Australia (2011); Estonia (2014); and Croatia (2014).

Jurisdictions with civil unions include New Zealand (2004); Andorra (2005); Connecticut (2005); Distrito Federal (Mexico City), Mexico (2006); New Jersey (2006); Coahuila, Mexico (2007); New Hampshire (2007); Uruguay (2007); Ecuador (2008); Illinois (2011); Hawai'i (2011); Brazil (2011); Delaware (2011); Rhode Island (2011); Colima, Mexico (2013); Malta (2014); Gibraltar (2014), and Chile (2015).

[Act on the Opening Up of Marriage 2001] (Neth.) (effective April 1, 2001).

Belgium (2003). Enacts law permitting same-sex couples to marry starting June 1, 2003. Civil Code Article 143 (Law of 13 February 2003) (Belg.).

Massachusetts (2003). Supreme Judicial Court rules that same-sex couples have the right to marry. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003). Marriage licenses issue beginning May 17, 2004.

C. Anti-Sodomy Laws Ruled Unconstitutional In The United States

***Lawrence v. Texas*, 539 U.S. 558 (2003).** United States Supreme Court rules that laws criminalizing intimate sexual conduct between persons of the same-sex violate the Due Process Clause of the Fourteenth Amendment.

D. Canada And South Africa Recognize Marriage Equality Through Court Decisions And Legislation

Québec (2002), British Columbia (2003), Ontario (2003). Quebéc Superior Court and British Columbia and Ontario Courts of Appeal rule that limiting marriage to opposite-sex couples violates the Canadian Charter of Rights and Freedoms. *Hendricks v. Québec*, [2002] R.J.Q. 2506 (Can. Que. C.S.); *EGALE Canada, Inc. v. Canada* (2003), 225 D.L.R.

4th 472 (Can. B.C. C.A.); *Halpern v. Canada* (2003), 65 O.R. 3d 161 (Can. Ont. C.A.). Marriage immediately becomes available throughout Ontario.

British Columbia (2003), Québec (2004). British Columbia Court of Appeal lifts stay of its decision and marriages are permitted immediately. Québec Court of Appeals rules same-sex marriage must be permitted immediately. *Hendricks v. Canada* (2004), 238 D.L.R. 4th 577 (Can. Que. C.A.).

Yukon Territory, Manitoba, Nova Scotia, Saskatchewan, Newfoundland and Labrador, and New Brunswick (2004-2005). Courts in each of these provinces and territories rule that same-sex marriage must be permitted. Government does not defend these lawsuits and does not appeal.

Canada (2004). Supreme Court rules that Parliament has authority to enact proposed same-sex marriage legislation throughout Canada. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Can.).

Canada (2005). Parliament passes and governor general gives royal assent to law officially permitting same-sex marriage throughout Canada. Civil Marriage Act, S.C. 2005, c. 33 (Can.).

South Africa (2004). Supreme Court of Appeal rules that excluding same-sex couples from civil marriage violates the constitution by denying them liberty and equality. *Fourie v. Minister of Home Affairs* 2005 (3) BCLR 241 (S. Ct. App.) (S. Afr.).

South Africa (2005). Constitutional Court, South Africa's highest court for constitutional matters, rules that excluding same-sex couples from civil marriage is unconstitutional and that anything less than full marriage equality violates equal protection. *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) (S. Afr.).

South Africa (2006). Enacts law authorizing same-sex marriages throughout South Africa beginning on November 30, 2006. Civil Union Act 17 of 2006 (S. Afr.).

E. Recognition Of Marriage Equality Accelerates

Spain (2005). Enacts legislation permitting same-sex couples to marry. Ley 13/2005 el día 1 de julio de 2005 (Spain) (effective July 3, 2005).

Israel (2006). Supreme Court rules that Israeli government must recognize same-sex marriages performed outside Israel. HCJ 3045/05 *Ben-Ari v. Dir. of the Population Admin. in the Ministry of the Interior* (2006) (Isr.) (unpublished decision).

Norway (2008). Amends marriage law to be gender-neutral and simultaneously repeals its registered partnership law. Besler. O. nr. 91 (2007-2008) (Nor.) (effective January 1, 2009).

Sweden (2009). Eliminates registered partnerships and enacts a single, gender-neutral marriage

law for all couples. Civilutskottets betänkande 2008/09:CU19 (Swed.) (effective May 1, 2009).

Distrito Federal (Mexico City), Mexico (2009). After first recognizing civil unions in 2006, amends marriage law to permit same-sex couples to marry. Decreto por el que se reforman diversas disposiciones del Código Civil para el Distrito Federal y del Código de Procedimientos Civiles para el Distrito Federal, Gaceta Oficial Del Distrito Federal, 29 de diciembre de 2009 (Distrito Federal, Mex.) (effective March 4, 2010).

Portugal (2010). Congress amends marriage laws to be gender-neutral and to define marriage as a contract between two people that intend to form a family through a community of life. After constitutional court declares it legally valid, Portugal's President ratifies the law. Lei No. 9/2010 de 31 de maio 2010 (Port.) (effective June 5, 2010).

Iceland (2010). Enacts legislation allowing same-sex to marry and eliminating registered partnership regime. Lög Nr. 65/2010, 836—485th issue, 28 March 2010, Hjúskaparlög, staðfest samvist o.fl. (Ice.) (effective June 27, 2010).

Argentina (2010). Enacts same-sex marriage law, becoming first South American country, and third predominantly Catholic country, to recognize equal marriage rights for same-sex couples. Ley No. 26.618 de 22 de julio 2010 (CXVIII) B.O. 31.949 (Arg.) (effective July 22, 2010).

Mexico (2010). Suprema Corte de Justicia de la Nación, Mexico's highest court, rules that all Mexican states must recognize same-sex marriages performed in Mexico City. Acción de Inconstitucionalidad 2/2010 Promovente: Procurador General de la República, Pleno de la Suprema Corte de Justicia [Supreme Court], Agosto de 2010 (Mex.).

Colombia (2011). Constitutional Court gives Congress two years to enact legislation recognizing same-sex unions. Corte Constitutional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11 (Colom.), *available at* http://www.corteconstitucional.gov.co/ RELATORIA/2011/C-577-11.htm.

Brazil (2011-2012). Supreme Federal Court, Brazil's highest court, rules in 2011 that same-sex couples throughout the country are entitled to rights under the constitution's provision for stable unions. S.T.F., ADI No. 4277, Relator: Ministro Carlos Ayres de Britto, 04.05.2011, S.T.F.J. (Braz.). Shortly thereafter, Superior Tribunal de Justiça, Brazil's highest court except for federal constitutional questions, rules that constitution permits same-sex marriage and orders civil union of two women to be converted into marriage. S.T.J., Rec. Esp. No. 1.183.378-RS, Relator: Luis Felipe Salomão, 25.10.2011, S.T.J.J. (Braz.). In 2012, courts in many Brazilian states—including Alagoas, Bahia, Distrito Federal, Piauí, and São Paulo—order marriage licenses be issued to same-sex couples.

Denmark (2012). Enacts law that replaces existing registered-partnership regime with full marriage equality for same-sex couples. Lov nr. 532 af 12 jun 2012 (Den.) (effective June 15, 2012).

Quintana Roo, Mexico (2012). After Governor of Quintana Roo annuls marriages of same-sex couples that took place in 2011, Secretary of State reverses annulments and allows future same-sex marriages.[3]

Oaxaca, Mexico (2012). Suprema Corte de Justicia de la Nación, Mexico's highest court, rules that state of Oaxaca's prohibition on same-sex marriages is unconstitutional. Decision does not require, but paves the way for same-sex marriages throughout Mexico. Amparo en Revisión 581/2012, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], Dec. 5, 2012 (Mex.). Court relies in part on a 2012 decision from the Inter-American Court of Human Rights holding that sexual orientation is a suspect class and that a child custody ruling against a lesbian mother based on her sexual orientation violated the equal protection guarantees under the American Convention on Human Rights. *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

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[3] *See Gay Marriages Will Be Recognized in Quintana Roo*, MEXICO GULF REPORTER (May 4, 2012), http://www.mexicogulfreporter.com/2012/05/gay-marriages-recognized-in-quintana.html.

New Zealand (2013). After first authorizing civil unions in 2004, New Zealand enacts legislation defining marriage as union of two people "regardless of their sex, sexual orientation, or gender identity." Marriage (Definition of Marriage) Amendment Act 2013, 19 April 2013 (N.Z.) (effective August 19, 2013).

Uruguay (2013). After authorizing civil unions in 2007, enacts law defining civil marriage as union of two persons of same or opposite sex. Ley No. 19.075 (Matrimonio Igualitario) de 3 de mayo de 2013 (Urug.) (effective August 5, 2013).

Brazil (2013). National Council of Justice, which oversees judiciary and is presided over by Chief Justice of Supreme Federal Court, requires all Civil Registry Offices to perform civil weddings for same-sex couples and to convert same-sex civil unions into marriages upon request. Resolução n. 175, de 14 de maio de 2013, D.O.U. de 15.05.2013 (Braz.) (effective May 16, 2013). (Action challenging resolution has been filed.)

France (2013). Enacts law allowing same-sex couples to marry. Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe (Fra.) (effective May 18, 2013).

England and Wales (2013). Enacts law legalizing marriage for same-couples in England and Wales. Marriage (Same Sex Couples) Act of 2013, Chapter 30, 17 July 2013 (Eng.) (effective March 29, 2014). United Kingdom had authorized registered partnerships in 2004.

Colombia (2013). After Congress fails to enact legislation recognizing same-sex unions before June 20, 2013 deadline set by Constitutional Court in 2011, a judge solemnized the marriage of a same-sex couple in Bogotá and an appellate court in Cali ordered a notary to solemnize the marriage of another couple. (Action challenging those rulings has been filed in the Constitutional Court.)

Malta (2014). Authorizes registered civil unions for same or different sex couples. Act IX of 2014, Civil Unions Act, 2014, 14 April 2014 (Malta).

Scotland (2014). Enacts law permitting same-sex couples to marry. Marriage and Civil Partnership (Scotland) Act, 12 March 2014, (A.S.P. 5) (effective December 31, 2014).

Gibraltar (2014). Creates registered civil partnerships for same-sex and different-sex couples. Act No. 2014-10, Civil Partnership Act 2014, 25 March 2014 (Gib.) (effective March 28, 2014).

Vietnam (2014). Abolishes prohibition against wedding ceremonies by same-sex couples,[4] although new law does not recognize such marriages. Law On Marriage and Family, No. 52/2014/QH13, ch. II, art. 8(2), June 19, 2014 (Viet.) (effective Jan. 1, 2015).

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[4] The Marriage And Family Law, No. 22/2000/QH10, ch. II, art. 10(5), June 9, 2000 (Viet.).

Croatia (2014). Enacts law recognizing same-sex partnerships after voter referendum amended constitution to limit marriage to opposite-sex couples. Zakona O Životnom Partnerstvu Osoba Istog Spola ("Civil Partnership Act"), No. 71-05-03/1-14-2, 18 July 2014 (Cro.).

Luxembourg (2014). Enacts law authorizing marriage by same-sex couples. Loi du 17 juillet 2014 relative au réforme du mariage, Memorial A No. 125 (Lux.) (effective January 1, 2015). Luxembourg had registered partnerships since 2004.

Coahuila, Mexico (2014). After allowing civil unions since 2007, becomes first state in Mexico to authorize marriage by same-sex couples through legislation. Decreto No. 574, Se reforman y adicionan diversas disposiciones del Código Civil para el Estado de Coahuila de Zaragoza, Periodico Oficial, 16 de septiembre de 2014 (Coahuila, Mex.).

Estonia (2014). Enacts law conferring marital benefits on registered cohabitating couples irrespective of gender, becoming first country of former Soviet Union to enact laws recognizing same-sex couples. Kooseluseadus ("Registered Partnership Act"), 9 Oct. 2014 (Est.) (effective January 1, 2016).

Finland (2014). After implementing registered partnerships in 2002, Finland's parliament votes in 2014 in favor of citizens' initiative-based bill to amend the Marriage Act to provide equal marriage for same-sex couples. President signs bill in February 2015. EK 41/2014 vp, Citizen's Initiative to the Parliament

to Amend the Marriage Act (KAA 3/2013 vp), 12 December 2014 (Fin.) (effective March 1, 2017).

Ireland (2014). Government approves holding Marriage Equality referendum in May 2015 to decide whether to amend constitution to allow marriage to be contracted without regard to gender.[5]

Chile (2015). National Congress approves bill recognizing civil unions for same-sex couples. No. 34/SEC/15, Proyecto Ley Acuerdo Unión Civil, 28 de enero de 2015 (Chile). President Michelle Bachelet, who has made legalizing same-sex marriage a longer-term goal of her administration, is expected to sign the bill.

Shibuya Ward, Tokyo, Japan (2015). Assembly announces plans to vote on providing legal rights to same-sex couples.[6]

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[5] Gov't of Ireland, Dep't of Justice and Equality, *Minister Fitzgerald Welcomes Government Approval for Marriage Equality Referendum in May* (Dec. 16, 2014), http://www.justice.ie/en/JELR/Pages/PR14000369.

[6] Martin Fackler, *District in Tokyo Plans to Extend Rights of Gay Couples*, N.Y. TIMES (Feb. 12, 2015), http://www.nytimes.com/2015/02/13/world/asia/tokyo-ward-plans-to-extend-rights-of-gay-couples.html?_r=0.